

IN THE MATTER OF THE ARBITRATION BETWEEN

The Fraternal Order of Police, Lodge No. 1,)
)
 Union,)
)
 and)
)
 The City of Independence, Missouri)
 (Police Department),)
 Employer.)
)

GRIEVANCE OF CHRISTINA NUÑEZ

Appearances:

Jeffrey Unger, Esq., Assistant City Counselor, for the City of Independence, Missouri

Luke B. Harkins, Esq., for the Union

OPINION AND AWARD

BACKGROUND

This case arises under the Work Agreement (agreement) between the Union and the City of Independence, Missouri Police Department (Employer or City) involving two grievances filed by Police Officer Christina Nuñez (Grievant or Nuñez). Nuñez challenges the discipline issued to her by Chief of Police Fred Mills (Chief Mills). The Union contends that the City's discipline was untimely under the agreement and that it also lacked just cause to discipline the Grievant. The Union seeks a rescission of the discipline and that Grievant be restored to her former

position as a detective in the police department Intelligence Unit, and that all references to the discipline be removed from her personnel file.

Hearing was held at Independence, Missouri on October 16, 2006. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses. The parties elected to file post-hearing briefs. The parties stipulated that there were no procedural issues to be determined and that the grievance and arbitration were properly before the Arbitrator. The parties stipulated that the issue to be decided by the Arbitrator was if the City had just cause to discipline Christina Nuñez, and if not what should be the appropriate remedy.

STATEMENT OF FACTS

Analysis of the evidence indicates the following. Christina Nuñez has been employed by the Independence Police Department since January 1996, first as a dispatcher, and subsequently as a sworn law enforcement officer. In June 2003, Nuñez was transferred to the Investigations Bureau and worked there as a detective until she was transferred back to patrol for the disputed disciplinary reasons in September of 2005.

In the summer of 2005, Grievant was assigned within the Investigations Bureau to the newly-formed Intelligence Unit. Her supervisor was then Sgt. (now Captain) Ken Bergman (Bergman). Grievant was placed in the Intelligence Unit at the request of Major Jerry Heard (Heard), who at that time was the commander of the Investigations Bureau. From June or July until her transfer to patrol, Grievant worked on the start-up process for the Intelligence Unit while she also continued working on and finishing her previously assigned cases. On approximately August 17, 2005, Nuñez arranged an interview with three witnesses in regards with one of those cases she was working. Since one of the interviewees was unavailable before

6:00 p.m., Nuñez contacted Bergman for his approval to adjust her schedule the day before the scheduled interviews in order to avoid incurring overtime. The Grievant and Bergman also discussed her taking another officer with her for officer safety reasons.

On the afternoon of August 17th, the day before the interviews were to occur, Nuñez sent an e-mail to Bergman with a copy to Heard, Bergman's commanding officer, wherein she addressed the issue of taking another officer to the interviews, asking that "if you all want someone to meet me, just give me a 2-way [radio] and let me know." Neither Bergman nor Heard responded to Nuñez, so on August 18th she proceeded to conduct the witness interviews alone. Near the conclusion of the last interview, Grievant received a call from Bergman who inquired, and she responded, that she was conducting the interviews by herself. Bergman then instructed her to meet him in Major Heard's office on Monday morning, August 22nd.

Following that conversation, Grievant contacted Sergeant. Becky Edwards (Sgt. Edwards), her Union representative, to request that she accompany her to the Monday meeting. Sgt. Edwards contacted Major Heard, who advised her that Grievant would not need a Union representative at the meeting. Sgt. Edwards relayed that assurance to Grievant, so Grievant attended the meeting on August 22nd without Union representation in reliance on that assurance.

During the meeting, Major Heard presented Nuñez with a memo prepared by Bergman that contained critical allegations against her in several respects, including the witness interviews she conducted on August 18th. Also, Bergman requested that Grievant be immediately removed from the Intelligence Unit. Following the meeting, which had become heated, Major Heard advised Grievant that he would be looking further at the situation, and he instructed her to only work on her case files, and not on Intelligence Unit matters. Nuñez disputed the allegations against her and offered to take up Heard on his offer to put her "on the box", otherwise known as a voice stress analyzer, a form of "lie detection", whereupon Heard withdrew his offer. Nuñez repeated her request to take the test to dispute Bergman's allegations, but was not allowed to do

so.

Subsequent to the meeting, Heard reviewed Grievant's activity from July 7 through August 10 on her case files, and provided a memo up the chain of command to Col. John Main (Main) for Chief of Police Mills criticizing Nuñez in several respects and recommending that Grievant be transferred to the Patrol Division. Main reviewed Major Heard's memo, and recommended to Chief Mills that Nuñez be transferred to Patrol, and that she be given a 40-hour suspension to be held in abeyance for one year. Chief Mills, without further investigation and without ever speaking to Grievant, issued his letter of discipline on September 7th implementing the recommendations of Main. Grievant timely filed grievances over the transfer and the suspension, and this arbitration followed.

ISSUES

WAS THERE JUST CAUSE TO DISCIPLINE THE GRIEVANT, AND, IF NO JUST CAUSE EXISTED, WHAT SHALL BE THE REMEDY. IF JUST CAUSE TO DISCIPLINE THE GRIEVANT DID EXIST, WAS THE DISCIPLINE TIMELY UNDER THE AGREEMENT.

I. RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

Article 3 – Management Rights

The City possesses the sole right to operate and manage the Department. Without limiting the generality of the foregoing, the City possesses and retains the right:

1. to determine the mission of the Department;
2. to direct the working forces;
3. to hire, assign, promote, transfer, or lay off bargaining unit members;
4. to determine the methods, means, number of personnel, number of job classifications, job duties, equipment and supplies needed to carry out the mission of the Department;
5. to discipline or discharge for just cause;
6. to change existing methods, procedures, policies, orders or facilities;
7. to take whatever other actions may, in its judgment, be necessary to carry out the mission of the Department.

It is the intent of the City to meet and confer with the Lodge regarding matters of which affect bargaining unit personnel. The parties recognize that such action is not required by law and is purely voluntary on the part of the City.

The Lodge will attempt to resolve any issue involving the Department by discussion with the Chief before making any public statement or involving personnel outside the Department.

It is the intent of both parties that the recognition of the Lodge will facilitate the resolution of issues that may arise within the Department in a prompt and amicable manner. The

Lodge agrees that in the event of any dispute or difference it may have with the Department or any member of management during the term of this Memorandum, the Lodge shall attempt to resolve the matter through the grievance procedure set forth herein.

Article 8 – Transfers

Section 2. Reasons. Bargaining unit members may be transferred by their commander to another division or assignment either temporarily, as a result of disciplinary action, for just cause, or for the annual preference period. Such transfers shall not be made for arbitrary or discriminatory reasons.

Article 13 – Discipline

Section 1. Time Constraints. Absent unusual circumstances discipline imposed as a result of other than a Professional Standards Unit investigation, Shooting Team investigation or Accident Review Board findings shall be imposed within fifteen (15) days after the incident giving rise to the discipline occurs or becomes known to a command staff officer.

Section 2. Just Cause. Bargaining unit members, excluding probationary bargaining unit members, shall be disciplined or discharged only for just cause. Discipline or discharge for cause shall include, but not be limited to, violation of City Charter, Personnel Policies and Procedures, Department Rules and Regulations, General or Special Orders, and State Law.

Section 3. Suspensions. For the purposes of FOP bargaining unit members, a suspension will be based on work hours.

UNION POSITION

The Union contends that the City did not have just cause to discipline the Grievant and that the City failed to comply with the time limits in the Work Agreement for instituting discipline. The Union requests that Grievant be returned to her previous assignment as a

detective in the Intelligence Unit, and that all references to the subject discipline be removed from Grievant's personnel file and shift level file.

CITY POSITION

The City concedes that Grievant was not timely disciplined for just cause by one day, but that "by imposing the discipline one day after the 15-day period resulted in no prejudice to Officer Nuñez and was imposed in the spirit of the Work Agreement."

OPINION AND DISCUSSION

The City failed to meet its burden of proving in all respects that Grievant was disciplined for just cause and, therefore, it is unnecessary to dwell excessively on the plea of the City that the issue of timeliness should be disregarded. There was conflicting testimony of certain witnesses at the hearing, thus raising significant credibility issues. In this case, the City's version of events leading up to the discipline of Grievant are different from the recollections of the Grievant and her co-workers. The totality of the circumstances, and the credibility of the witnesses, are paramount factors to be weighed by the Arbitrator. Included in this Arbitrator's analysis are the demeanor of the witnesses, perceived bias, personal or bureaucratic interest or motive, contradictions to the witness's testimony, capacity to recall events and opportunity to perceive events. These factors bear directly on the credibility of a witness in evaluating the testimony and then allocating the proper weight to the testimony.

"The self interest of a witness is the greatest for those who stand to gain or lose from the decision of the Arbitrator. Obviously, the Grievant's job is at stake. However, his supervisors are equally interested since their reputation and judgment is subject to approval or disapproval. The Arbitrator must carefully consider all the circumstances that would tend to create bias on the

part of any witness, and weigh such testimony with what other witnesses stated. When choosing between conflicting testimony, the version of events that is most reasonable, and corroborated by other witnesses, is the most credible.” *Aramark Corp. and Retail, Wholesale And Department Store Union Local 1064*, 30 LAIS 1001 (Allen, 2002).

The Arbitrator will afford the most weight to the testimony of the witnesses who have the least personal or professional interest in the outcome of the arbitration, and who were perceived the least likely to put a positive glow on their testimony as to what occurred. In this case, those witnesses are co-workers such as Detective Slaybaugh and Sergeant Edwards. The co-workers, without any demonstrable or reasonable motive to be untruthful, both testified in support of the Grievant’s claim.

The event that triggered the disciplinary action against Grievant was her conducting interviews of three persons at their residence in Kansas City, Missouri without another officer or detective present with her. Bergman testified that he ordered Grievant to have someone else present, and that his reason for doing so was officer safety. The Arbitrator agrees in part with the City that safest police procedure might have been for Nuñez to have been accompanied to the interviews, however the question at hand is whether Bergman actually issued such an order and whether the Grievant disobeyed or intended to disobey a direct order. On that point the testimony of Nuñez and Bergman were in direct conflict. The Arbitrator believes that the evidence presented at the hearing circumstantially demonstrates that Grievant did not intentionally disobey an order, and that Bergman and Major Heard both failed to adequately communicate with Grievant---possibly intentionally---about their insistence that she be accompanied during the interviews.

Despite the self-serving testimony of Bergman and Heard that Independence police detectives always have backup present for field interviews for officer safety reasons, the testimony of Grievant and Detective Brad Slaybaugh were that, in practice, it is not uncommon

for detectives to conduct field interviews without a second detective or officer present because of budget and scheduling considerations. The testimony of Bergman, Heard and Chief Mills that detectives always take backup with them ignores the reality that day to day operations are often conducted in less than perfect conditions.

There was no evidence suggesting that Grievant had any personal motive for conducting the interviews alone and to risk an insubordination charge by disobeying an order, as alleged by the City. It is clear from the testimony that Grievant was acting in the Employer's best interest, including taking the initiative to adjust her work hours to save the cost of overtime.

The testimony and exhibits presented at the hearing provide a detailed account of the actions and communications of Grievant, Bergman and Major Heard. The matter began when the Grievant made arrangements with the interviewees for her to stop by their residence in Kansas City on her way back to Independence from a training exercise in Overland Park, Kansas. One of the interviewees was not available until after 6:00 p.m., and so to avoid incurring overtime, Grievant contacted Bergman to request his approval for her adjusting her hours of work to start her day later than normal on the day prior to the interviews. During that contact, Bergman discussed having a second detective present for officer safety reasons. Bergman testified that he gave Grievant an order that she should have another detective meet her at the Kansas City location. Grievant testified that Bergman only said that he would discuss the matter with Major Heard, implying to her that he would get back with her to give her his final decision. It is undisputed that Bergman authorized Grievant to adjust her hours of work for that day. After that conversation Bergman did in fact call Major Heard at his residence, and discussed Grievant's planned interviews. Bergman testified that he did so because he could tell by Grievant's "tone" during their conversation that she intended to disobey his order regarding a second detective. Major Heard's response was to contact the Detective Bureau in order to have someone standing by to accompany Grievant. Bergman never again contacted the Grievant until

after the interviews.

On August 17th, the day before the scheduled interviews, and after that initial conversation with Bergman, Grievant sent Bergman and Major Heard an e-mail wherein Grievant went into some detail about the prospective interviewees, and stated that she felt comfortable going alone. Grievant testified she sent the e-mail because she had expected to hear back from Bergman regarding his discussion with Major Heard about her taking a second detective with her. Grievant ended the e-mail with the statement “if you all want someone to meet me, just give me a 2-way [radio] & let me know.” The e-mail was sent at 4:29 p.m. on August 17th, and was opened by Bergman at 7:18 p.m. that same day. Major Heard opened that e-mail the next morning, August 18th, at 6:38 a.m. The interviews were scheduled at 6:30 p.m. August 18th.

Neither Bergman nor Heard contacted Nuñez in response to her e-mail, even though Bergman had previously expressed to Heard that he felt Grievant intended to disobey his order, and even though Heard had apparently contacted the investigations bureau to have a detective standing by. Also, both Bergman and Heard each testified that they were concerned about Nuñez’s safety if she went to the interview location without backup, and even though her e-mail clearly stated she intended to go alone unless they told her otherwise, neither one of them attempted to contact her or take any preventive action to ensure her safety. It is the belief of the Arbitrator that neither Bergman nor Heard were truly concerned with Grievant’s safety at that point, but were simply sitting back waiting to let Grievant disobey the order allegedly given by Bergman. Even if Bergman honestly felt that he had clearly given Grievant an order to take someone with her to the interviews, he offered no valid justification for not verifying his order with Grievant after she sent the e-mail. When questioned about the e-mail at the hearing, Bergman testified that he felt the e-mail was just part of Grievant’s “plan” to disobey his order, based on the impression he got from Grievant’s “tone” during their previous conversation on the

subject. Grievant's e-mail indicates to the Arbitrator that she believed the matter was still under consideration, and it contained an express request to Bergman to contact her to correct her "plan" if he still wanted her to have someone meet her. It is reasonable to conclude that Bergman's testimony was disingenuous and self-serving because if, as claimed by Bergman, Grievant was intent on disobeying his order, and if he was truly concerned for her safety, he would have responded to Nuñez's e-mail by calling her on her Nextel phone/radio or by sending another officer to meet her at the witness location in Kansas City. Instead he chose to lie in wait to discipline her.

For his part, Major Heard chose to take Bergman's word at face value that he had given Grievant an order, despite the obvious, contrary impression reflected in Grievant's e-mail. Heard had already discussed the subject of the interviews with both Nuñez and Bergman prior to his having opened Grievant's e-mail on the morning the interviews were to take place, yet he too failed to follow through to ensure that Nuñez understood his desire that she not conduct the witness interviews alone. As with Bergman, it appears to the Arbitrator that Heard also was lying in wait for Grievant to conduct the interviews alone, in order to discipline her for doing so.

In reaching the foregoing conclusion, the Arbitrator looks to the likely motive for Bergman's behavior. The answer lies in the appearance that Bergman was retaliating against Grievant for her previously having made a complaint to Major Heard about possible abuse of overtime by Bergman regarding an off-duty job assignment. Grievant had voiced her concerns to Major Heard over Bergman's actions only a week or two before the interviews. Regardless of the reasons for the actions of Bergman and Major Heard, those actions were unreasonable, and it is apparent from the evidence that Grievant did not disobey an order regarding the interviews. The City has failed to prove that it had just cause to discipline Grievant for interviewing the witnesses unaccompanied by another officer.

An additional basis for Grievant's discipline was the allegedly deficient work

performance by Grievant on the remaining assigned case files prior to her transfer to the Intelligence Unit. The evidence suggested that Heard's examination of the case work done by Grievant from early July to early August was incomplete and superficial, and as a result he therefore mistakenly concluded Grievant was not performing as expected during that time frame. Because of Heard's inadequate investigation, the Arbitrator cannot agree with Heard's conclusions about Grievant's alleged poor job performance during the relevant time period at issue.

It is unclear to the Arbitrator why Grievant's work performance regarding her case files was even made an issue. Neither Bergman nor Heard testified about any concern with Grievant's activity prior to the August 2nd meeting, and Bergman's memo of August 20th makes no mention of Grievant's case work, other than the interview issue. It appears that Heard decided to pursue that line of inquiry only after the meeting, and only after Bergman had requested that Grievant be transferred. This was also after Heard told Grievant she would be terminated if the Computer Voice Stress Analysis (CVSA) (the "box") results showed she was lying about Bergman telling her he would talk to Heard about the interview matter. (As previously noted, Nuñez asked to take the test but was denied.) Nevertheless, Heard requested that Grievant provide him with her case activity from the beginning of July. Heard testified that he could not recall if he received computer printouts from Grievant, or hand written notes of her activity, but Grievant testified that she simply printed off data that was readily reviewable by Heard from the computer system utilized by detectives. The raw data from Heard's review was not presented at the hearing, only the information reflected in his memo to Chief Mills and his generalized testimony about his findings. Heard further testified that he did not attempt to discuss the validity of his findings with Nuñez nor provide her with an opportunity to account for her activity on the dates in question that might not be reflected in the information he reviewed. Denying Nuñez the opportunity to give her side of the story prior to Heard making his report to

Chief Mills amounts to a denial of fundamental due process to Grievant.

In fact, the evidence demonstrated that Grievant was performing her job as a detective quite adequately before her transfer to the Intelligence Unit position, with the possible exception of certain issues with her duty weapon and cell phone. Following her transfer to the Intelligence Unit, Grievant found herself being delegated to by Bergman regarding the logistical aspects of setting up the Unit itself, and the office space it was to occupy. If there was a failure on Grievant's part to adequately work her previously assigned cases, at least some of the blame must be squarely laid upon the Employer for demanding Grievant to do two jobs simultaneously. Major Heard's negative reaction to what he concluded in his review of Grievant's case activity may indeed have been appropriate were it accurate, but that does not necessarily mean that Grievant alone dropped the ball nor does it excuse his failure to confront the Grievant with his findings to allow her to explain and correct, as the evidence demonstrated, his erroneous and incomplete interpretation of the case file activity. It is noteworthy that Bergman was chosen to "supervise" the newly-formed intelligence unit even though he had never worked as a supervisor in the Investigations Bureau. The Unit would have to move into new space at police headquarters before it could become functional, which involved setting up phone lines, computers, desks, other office furniture and even new paint on the walls. The Unit's purpose and function was also in the process of being established, apparently without sharply defined parameters. While all this was taking place, Grievant was still expected to work her prior cases, even though Bergman took little or no supervisory interest in her activity in that regard.

Grievant provided specific details in her testimony about her activity following the transfer, in contrast to Bergman and Heard, who each had only vague and confused recollections as to Grievant's activities during the time period at issue, as well as what took place with respect to the interviews of August 18th. Conversely, Grievant's testimony was specific and clear about the events involved in this arbitration. Furthermore, the evidence from all witnesses is that Grievant was a good patrol officer prior to being made a detective, was a good detective, and is now a good patrol officer since the transfer out of the Intelligence Unit. Only after her transfer to the Intelligence Unit under Bergman did Grievant allegedly become a poor employee. It appears to the Arbitrator that Grievant only morphed into a poor employee after complaining about to Heard about Bergman allegedly claiming call-out overtime for an off-duty assignment for which he was given adequate cancellation notice. The City has failed to prove that Grievant's job performance following her transfer into the Intelligence Unit is just cause for her removal from that Unit, let alone from the Investigations Bureau.

The Union contends that the transfer out of the Intelligence Unit and into the patrol

division was disciplinary and lacked just cause, and therefore the transfer must be reversed based on both Article 13, Discipline, and Article 8, Transfer. The Union requests that the Arbitrator provide the remedy of restoring Grievant to her former position in the Intelligence Unit.

Under the Work Agreement, Article 13, Discipline, Section 2, Just Cause, bargaining unit members may only be disciplined or discharged for just cause. As in all labor arbitration cases, the Employer bears the burden of establishing just cause for discipline, and in this case, the Union contends that the Employer has failed to carry that burden, both with respect to the time constraints and the merits.

The Employer argues that it has an absolute right to transfer Grievant under Article 3, Management Rights, which does provide that the Employer retains the right to hire, assign, promote, transfer or lay off bargaining unit members. However, the Union contends that general provision is limited by the specific language in Article 8, Transfers, Section 2, Reasons, which states, “Bargaining unit members may be transferred by their commander to another division or assignment either temporarily, as a result of disciplinary action, for just cause, or for the annual preference period.” The Union submits that the evidence shows that the transfer was disciplinary instead of contractual in nature, so that if the Employer has failed in its burden of establishing just cause for discipline, the transfer should be reversed.

The genesis of the idea of transferring Grievant out of the Intelligence Unit appears to have been conceived by Bergman, because it is referenced in his memo of August 20th, which was presented to Grievant during the August 22nd meeting. From that memo, it is clear that Bergman was making a case for imposing discipline on Grievant for disobeying his order regarding the interviews, although he dredged up other matters to portray Grievant in as negative a light as possible. At the end of the memo, Bergman called for Grievant to be issued a letter of reprimand and for a transfer out of the Intelligence Unit, both as disciplinary sanctions. Consequently, Major Heard essentially transferred Grievant out of the Intelligence Unit as a

result of the meeting of that meeting when he instructed Nuñez to work only on her cases from the Investigations Bureau. At that time, he indicated that he contemplated initiating further disciplinary investigation activity, including a CVSA exam. In his testimony, Chief Mills, who made the final disciplinary decision, stated that he never articulated any reason other than discipline as a reason for the transfer, and he confirmed that his letter to the City Manager was a report of disciplinary action.

Accordingly, since it is clear from a totality of the evidence that the transfer of Grievant was solely for disciplinary reasons, and since the City did not have just cause to discipline Grievant, then the transfer must be reversed.

The basic due process rights to which an employee who is accused of misconduct include the right to be informed of the charges, the right to confront accusers, the right to answer charges and the right to counsel or union representation. A most compelling reason for overturning the discipline in this case is the Employer's blatant violation of Grievant's right under the *Weingarten* line of cases to have a Union representative with her during the August 22nd disciplinary meeting. *National Labor Relations Board v. J. Weingarten*, 420 U.S. 251 (1975). The testimony of Major Heard, Sgt. Edwards, Detective Slaybaugh and Grievant all demonstrated that both the Union and the City understood and acknowledged a bargaining unit member's right of representation, yet Major Heard told Sgt. Edwards that Grievant would not need a Union representative to be present. Contrary to what Major Heard told Sgt. Edwards that Nuñez would not need Union representation at the meeting, it is clear from the evidence that he knew or reasonably should have anticipated that the meeting would be disciplinary in nature. He previously had discussed the witness interview situation with Bergman prior to the occurrence, and again after the interviews. In the second conversation, Bergman told him of his directive to Grievant to meet in Major Heard's office on Monday morning, and Major Heard instructed Bergman to put it all down on paper. Although Major Heard claimed he did not realize the

meeting was going to involve discipline, he began the meeting by handing Grievant a copy of Bergman's memo, which was highly critical of Grievant and which contained a request that she be disciplined. Even if Major Heard had not expected the meeting to involve discipline at the time he spoke with Sgt. Edwards, he certainly knew it would once he spoke with Bergman that morning and read the memo and could have immediately terminated the meeting. And, although Major Heard testified he would have no problem with Grievant having a Union representative in with her, he certainly did not make that offer to Grievant at the start of or during the meeting, knowing that Nuñez had already requested Union representation.

Under *Weingarten*, the right to representation attaches when the employee, not the employer, believes a meeting may become a disciplinary interview. See *City of Manchester*, 95 Fire and Police Reporter 21-2 (Greenbaum, 1994). In this case the Grievant expressly invoked her right to have a Union representative present with her, and Major Heard openly contrived to prevent that from happening. Such a blatant disregard for Grievant's rights must be dealt with appropriately, and that means any discipline resulting from the meeting must be rescinded. That action by Major Heard was so egregious, it must be firmly addressed, and in this case, that means vacating all discipline that flowed out of the meeting. Such a sanction will hopefully help deter future violations by the City.

At the hearing, most of the testimony centered on a few instances when Grievant failed to have her duty weapon on her person. The Union concedes and the Arbitrator agrees that the rationale behind the Employer's expectation that Grievant carry her duty weapon is sound. However, these instances forming the basis for discipline now, as by all accounts, the occurrences were addressed by Grievant's supervisors at the time they occurred without further action. Grievant admitted that on two occasions she forgot to bring her weapon with her to work, and that on both occasions, her supervisor at the time, Sgt. Kevin Freeman, was aware of the situation and verbally counseled her on the subject. Although Bergman claims he had similar

problems with Grievant, he did nothing to document those alleged instances until after the August 22nd meeting. It was only after the Kansas City interviews that Bergman decided to document any problems with Grievant's duty weapon. Since the issue was dealt with in the past, it should not form the basis for any new discipline just because Bergman wanted to discipline Grievant for disobeying his alleged order. Nevertheless, the Arbitrator is troubled by the Grievant's apparent lack of good judgment or lack of maturity in failing to carry her duty weapon.

The City also raised an issue regarding Grievant's alleged failure to carry her department-issued cell phone as it related to two "call-outs" on barricaded subjects. Bergman testified that Grievant missed one call-out, and responded late to a second. He also described an instance when he came in contact with Grievant at an off-duty assignment when Grievant did not have her department-issued cell phone with her. Grievant rebutted that on the first call-out, she had only recently been issued the phone, and did not realize until well after the fact that she had been called. Grievant testified that on the second call-out she was attending a football game, and elected not to take the phone in with her for fear of losing or dropping it. Grievant further testified that if she had taken the phone into the stadium, she could not have responded to the call-out until the rest of her party was ready to leave, since she did not drive herself. These explanations too are troubling to the Arbitrator since, if Grievant knew she was subject to call-out, she should have carried her phone with her and have anticipated in advance the need to make arrangements to be able to respond to a call-out.

CONCLUSION

The City has failed to meet its burden of demonstrating just cause for the discipline of Grievant. The Employer failed to establish that Grievant disobeyed a direct order with regard to

the Kansas City interviews. The Employer also failed to establish that Grievant's work performance justified discipline because the investigation conducted by Major Heard on this issue was woefully inadequate and denied the Grievant the fundamental right to have Union representation present at a meeting that was disciplinary in nature.

The Union contends that the City transferred Grievant from the Intelligence Unit to the patrol division purely for disciplinary reasons, and that because the City failed to establish just cause for the discipline, the transfer is in violation of the Work Agreement, and must be reversed. In addition, the Union argues that Employer's blatant violation of Grievant's *Weingarten* rights should be sanctioned by restoring Grievant to her former position in the Intelligence Unit. The City argues that the transfer was made as a positive move to aid the Grievant's career. This explanation is suspect, however the testimony was unanimous that the transfer yielded positive results in that Officer Nuñez has become a better and more mature police officer. With that admission and concession by the City, the Arbitrator perceives no reason why the Grievant should not be welcome back and successful in the Investigations Bureau.

The case also turns on the adequacy of the City's investigation prior to discharging the Grievant. A fair and objective investigation by the City is among the elements of just cause. Inherent in that element is the concept of due process. The Union has raised the issue of whether the City clearly stated its position and gave adequate notice about the basis for discipline. "An employee must be presented an opportunity to present his side of the case before the employer decides to discharge him." *Teamsters Local 878 v. Coca Cola Bottling Co.*, 613 F. 2d 716 (8th Circuit, 1980), *cert denied* 557 U. S. 988 (1980). In that case, the Arbitrator found that the employee had engaged in the behavior alleged by the employer, however the arbitrator refused to uphold the termination because of the due process violation. "Procedural fairness requires an employer to conduct a full and fair investigation of the circumstances surrounding an employee's

conduct and to provide the employee the opportunity to offer denials, or justifications that are relevant before the employer makes its decision, before the position becomes polarized.” *International Brotherhood of Electrical Workers, System Council U-13 and Montana-Dakota Utilities Co.*, 03-1 ARB 3390 (Calhoun 2003).

In the present case, the Arbitrator has concluded that the City was out of time in imposing discipline, and that it did not make a full and fair investigation into the facts and circumstances surrounding the allegations against Grievant, and thus denied the Grievant her fundamental due process rights. In view of the Grievant’s previous commendable years of service to the City without any previous discipline, and in view of the denial of her fundamental due process rights, the discipline was an unwarranted penalty.

Based on the hearing testimony and exhibits, it is clear that the Employer failed to carry its burden of establishing just cause for disciplining the Grievant. As a remedy, the Grievant should be restored to one of her former positions as a detective either in the Intelligence Unit or the Investigations Bureau, and that all references to discipline arising from this matter be removed from her personnel records.

AWARD

The grievance is sustained. The Employer is hereby ordered to reinstate the Grievant Christina Nuñez to her former or like position as a detective in the Investigations Bureau, including shift assignments, and that all records of the subject discipline be expunged from her employment records. The Arbitrator urges the Police Department not to disparage the reputation of Grievant nor retaliate against the Grievant because she exercised her rights under the agreement to challenge the discipline imposed upon her. The Arbitrator retains jurisdiction over this matter for the sole purpose of resolving any issue(s) pertaining to the relief ordered.

Such retention of jurisdiction shall be for a period of thirty (30) calendar days following the date of this Award. Absent a written request for an extension of the thirty (30) day period,

any request for the exercise of this Arbitrator's jurisdiction over this matter shall be deemed untimely, and no further proceedings shall be had before the Arbitrator. It is within the sole discretion of the Arbitrator to determine whether the issue presented by the party or parties is within the jurisdiction of this provision pertaining to the Arbitrator's retention of jurisdiction. Nothing in the retention of jurisdiction shall operate to prevent this Award from being final on the date upon which the Arbitrator has executed this Award. This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are, hereby, denied.

IT IS SO ORDERED THIS 28TH DAY OF March, 2007, by

A handwritten signature in cursive script, appearing to read "J. Margolin", written in black ink.

JAMES S. MARGOLIN, ARBITRATOR